IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 113 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTIBHAI RAMABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR HM PARIKH for Petitioners

Mr S P Dave, APP for Respondent No. 1

MR N K Majmudar for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 02/05/2001

ORAL JUDGEMENT

The present Criminal Revision Application under section 397 of the Criminal Procedure Code, 1973 (for short, 'the Code') has been preferred by the petitioners

above named challenging the judgment and order dated 16.2.1998 recorded by the learned Addl.Sessions Judge, Nadiad in Criminal Appeal No.2/93 under which the learned Addl.Sessions Judge dismissed the said appeal of the present petitioners confirming the judgment and conviction order dated 15.11.1992 recorded by the learned Judicial Magistrate First Class at Kapadvanj in Criminal Case No.1093/87 under which the learned Magistrate convicted the present petitioner no.1 for offence punishable under section 39 of the Indian Electricity Act and sentenced him to suffer R.I. for 12 months and to pay fine of Rs.3000/- in default of payment of fine to further undergo S.I. for 20 days. The learned Magistrate further convicted the two petitioners for offence punishable under section 186 read with section 114 of IPC and sentenced them to suffer R.I. for 30 days and to pay fine of Rs.300/-, in default of payment of fine, it was directed that the petitioners shall undergo 10 days S.I. The learned Magistrate acquitted both the petitioners from offence punishable under section 39-A of the Indian Electricity Act. The facts may be briefly stated as follows:

2. On 26.2.1987 at about 5 p.m. the officers of the Gujarat Electricity Board had visited an agricualtural land at village Kevadia in Kapadvanj Taluka in Kheda District. It was noticed at that time that the electric motor was functioning in the said field and it was further noticed that the dish of the electric meter was stationary, meaning thereby that though the electrical energy was being used, the consumption of electrical energy so used was not recorded on the meter. The original informant being Dy.Engineer of the Gujarat Electricity Board at Kapadvanj namely; Mr Kantibhai N Vankar recorded panchnama showing the aforesaid situation. It was noticed that a boy was present there and on enquiry it was brought to the notice of the original informant that the field belong to the present petitioners. Therefore, a panchnama was drawn and the said officer tried to remove the meter for the examination and according to the case of the informant, he was not allowed to take away the meter. Therefore, the original informant and the Dy.Engineer, filed FIR before the police station which was investigated and at the end of the investigation, a charge sheet was filed before the learned Judicial Magistrate First Class, Kapadvanj which was registered as Criminal Case No.1093/87 for offence punishable under section 39 and 39A of the Indian Electricity Act as well as for offence punishable under section 186 read with section 114 of IPC. After undertaking the full trial, the learned

Magistrate found that the first petitioner was guilty of offence punishable under section 39 of the Indian Electricity Act. He, therefore, convicted him as aforesaid but acquitted him for offence punishable under section 39A of the Act. The learned Magistrate found that petitioner no.2 was not guilty for offence punishable under sections 39 and 39-A of the Act, and, therefore, the said petitioner came to be acquitted of that charge by the learned Magistrate. With respect to the offence punishable under section 186 read with section 114 of IPC, the learned Magistrate found that both the petitioners were guilty and accordingly the learned Magistrate convicted both of them for that offence and imposed punishment as aforesaid. Feeling aggrieved by the said judgment and conviction order of the learned Magistrate, the petitioners herein preferred Criminal Appeal no.2/93. The learned Addl. Sessions Judge at Nadiad heard the parties and dismissed the said appeal of the present petitioners. Feeling aggrieved by the said judgment and order of the learned Addl.Sessions Judge, the petitioners have preferred this Criminal Revision Application under Section 397 of the Code. It has been mainly contended here that the judgments and orders of the two courts below are illegal and perverse. That even the appreciation of evidence is illegal and the petitioners have been illegally convicted without any evidence on record. It is further contended that the original informant was not technically eligible for filing a complaint and, therefore, the entire subsequent proceedings should be treated to be illegal as they stand vitiated for want of legal and valid FIR. It is further contended that there was no evidence before the trial court to show that theft of electric power was committed by the present petitioner. For that there was no evidence to show that the petitioners were any way connected with the offence in question. That therefore, the judgments and orders of the two courts below are illegal, perverse and deserve to be set aside. It is, therefore, prayed that the present Revision Application be allowed and the judgment and conviction order recorded by the two courts below be quashed and set aside and the petitioners herein be set at liberty.

3. On submission of the aforesaid Revision Application, Rule was issued. Mr S P Dave, learned APP appears for respondent No.1-State of Gujarat. It seems that the original informant and the Dy. Engineer was subsequently added as respondent no.2 in the Revision. He was also served and Mr N K Majmudar, learned Advocate represented the second respondent.

4. I have heard Mr H M Parikh, Mr S P Dave and N K Majmudar, learned Advocates for the respective parties, who have taken me through the two judgments as well as through the evidence of the witnesses. Learned Advocate for the petitioner has contended before me that there was no evidence before the trial court to show that the original informant was authorised or eligible to file FIR or complaint against the present petitioners. On this aspect of the case, Mr N K Majmudar, learned Advocate for respondent no.2 has drawn my attention to a confidential circular dated 19.7.1996 wherein it has been mentioned that in order to move the police a criminal case is to be registered. That anybody can register a criminal case. However, theft of energy will invariably be detected by a GEB official first, the GEB official will therefore, draw up the panchnama and make a record of the condition of the matter or the supply line, as the case may be, which shows theft of electrical energy. That on this, a police complaint can be registered for theft of energy under Section 379 of IPC. that the Engineer/Senior Officer in-charge of the checking whether I/C squad of field unit should register the complaint with the police.

5. This means that any Engineer of the Board was eligible to file a complaint before the police. In this aspect of the case, an attempt was made to show that the process undertaken was not permissible under Section 50 of the Indian Electricity Act, 1910 (for short, 'the Act'). Section 50 of the Act states that no prosecution shall be instituted against any person for any offence under this Act or any Rule, licence or order thereunder, except at the instance of the Government or a State Electricity Board or an Electrical Inspector or of a person aggrieved by the same. In the present case, this being a case of power theft, the GEB was a person aggrieved by the aforesaid alleged theft of the electric supply and, therefore, the Board was technically eligible to institute prosecution in view of the provisions made under section 50 of the said act. As said above, the Board has delegated power to its Engineers. "The Engineer" would include all Engineers employed in the employment of the Board. Even the Asstt.Engineer, Dy.Engineer, Executive Engineer, Superintending Engineer, Additional Chief Engineer, Chief Engineer and all such Engineers will have to be treated to be Engineers within the meaning of the said Clause of the aforesaid distribution order. Therefore, a Dy.Engineer would be competent and eligible to file a complaint and FIR. In that view of the matter, the aforesaid contention of Mr H M Parikh, that the original informant was not eligible to file complaint or FIR is not acceptable.

6. Then we can turn to the provisions made in section 39 of the said act. This provision states that whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term which may extend to three years, or with fine which shall not be less than one thousand rupees, or with both. An attempt was made here to show that the Engineers have been authorised to file complaint and FIR against the consumers. That the petitioners were not and are not consumers and, therefore, FIR or complaint could not have been filed against them. When the word consumer is used then it is not to be read strictly rigidly and technically. In broader aspect, it can be said that whoever uses electricity can be treated to be consumer for this purpose. We can take example of a landlord in whose name electricity connection stands and the property has been rented out to a tenant. Thereafter, the tenant commits theft in respect of electrical energy. Then in that event, it cannot be said that the electric connection stands in the name of landlord and, therefore, no action can be taken against the tenant as he is not technically the consumer, though he may have committed theft of electricity supply. Therefore, looking to the nature of offence said to have been committed in the present case, the word 'consumer' will have to be read in a broader aspect and not in a technical aspect. Therefore, in the present case, it may not be possible for this Court to hold that the petitioners could not be technically treated to be consumer since electric connection does not stand in their individual names. Therefore, if otherwise, they are found to be guilty of the offence in question, then they would not get acquittal on the aforesaid technical aspect that they are not technically the consumer inasmuch as they are not the person in whose name the electric connection stands.

7. It has then been contended by the learned Advocate for the petitioner that the two courts below did not have any evidence to show that theft was committed by the present petitioners. It appears to be a matter of record that the land in question in which the electric connection was taken wherefrom the theft of electric supply was allegedly committed, belongs to the father of the petitioners. There is no evidence to show that the theft was committed by the present petitioners. There is no evidence to show that the petitioners were staying with the father. There is no evidence to show that the petitioners were cultivating the land. There is no evidence to show that the so-called mischief with the meter was made by the petitioners by inserting a plastic

stick in between the glass and the meter so as to stop functioning and motion of the switch inside the meter.

8. On going through the evidence on record, I find that there is no semblance of evidence showing involvement of the present petitioners in the act of commission of offence under section 39 or 39-A of the said Act. The trial court has appreciated the evidence. The Sessions Court also appreciated the evidence. Looking to the legal position that this Court is sitting as a Court of Revision under section 397 of the Code, the powers of the Court are very limited. That can be gathered from section 401 of the Code. This court cannot reappreciate evidence unless it is shown that the judgment and orders recorded by the two courts below are eminently opposed to the evidence on record. In other words, this Court can interfere with the findings of fact only when it is found that the judgments and orders of the two courts below are illegal and perverse. meaning thereby, that the findings of fact have been recorded by the two courts below against the petitioners without any evidence for recording such a finding. With respect to the involvement of the present petitioners in the Act of commission of offence under section 39 of the Act, it would be worthwhile to refer to para 13 of the judgment of the trial court. There, the learned Metropolitan Magistrate has observed as to what was the position of the meter at the relevant point of time. With respect to the involvement of the present petitioners in the aforesaid offence, the observation of the trial court can be gathered from page 16 of the judgment. There, he has observed that a boy was present when the Dy.Engineer of the Board visited the spot. That an enquiry was made from the said boy and the said boy said that it was a well belonging to petitioner no.1 Even if the information was gathered from the boy as to the ownership of the well, the statement made by that boy will not be enough for prosecuting and convicting the present petitioners. As the well was situated in the agricultural, therefore, there would be revenue record of right in the form no.6,8A and 7/12 which would show the ownership of the well as well as the ownership of the field. No where it has come on record to prove that the petitioners are the owner of the aforesaid land. On the contrary, it has come on record that the field in question belonged to the father of the present petitioners and it stands in his name. As said above, simply because the father of the petitioners is or was the owner of the land and the well and simply because he was and he is the person in whose name the electric connection stands, it would not mean that the petitioners could not be convicted and

prosecuted for the offence punishable under section 39 of the said Act. At the same time, there should be some evidence to show that the petitioners had actually involved themselves in the commission of offence. If the connection stands in the name of a particular person, it can be reasonably inferred that the said person has committed theft. If the land belongs to a particular person, a reasonable inference can be drawn that that person has committed the offence of power theft. In the present case, neither the well nor the field belongs to the petitioners and even the connection of electric supply does not stand in the name of the petitioner. In that view of the matter, it is not possible for this court to find out as to how the petitioners are found by the two courts below to be the persons involved in the offence in question. The trial court as well as the Appellate Court both have considered the evidence of the witnesses examined by the prosecution in support of its case. However, nowhere it has been mentioned as to what is the evidence on the basis of which the two courts below have recorded findings that the power theft has been committed under section 39 of the Act by the two petitioners. In above view of the matter, I am of the view that the two courts below have recorded the aforesaid finding without any evidence whatsoever with respect to the involvement of the present petitioners in the commissioning of the offence in question. As said above, when the findings of fact have been recorded by the two courts below without any semblance of evidence, then it has to be observed by this court that the findings of the two courts below are illegal and perverse and when the findings of the two courts below are illegal and perverse and against the weight of evidence and/or when the said findings are recorded by the two courts below without any semblance of evidence on record, then in that event it becomes statutory duty of this court to interfere with the said findings of fact. I am, therefore, of the opinion that the prosecution has totally failed in bringing home the charge to the petitioners. Learned APP as well as the learned Advocate for the original informant both were requested to point out evidence on record of the basis of which the findings can be arrived at even by this court to the effect that the petitioners had committed power theft. However, both of them could not point out any evidence to prove this event.

9. In above view of the matter, I am of the view that there is complete absence of evidence on the aforesaid aspect of the case and consequently it can be said that it is a case of no evidence with respect to the

involvement of the present petitioners in the commission of offence under section 39 of the Act. In the premises, I am of the clear decision that the two courts below have committed serious illegality in recording the findings of fact that the petitioners have committed power theft within the meaning of section 39 of the Act.

10. So far as the offence punishable under section 186 read with section 114 of IPC is concerned, it would be necessary for this court to consider the provisions made in section section 195 of the code. The provision can be read as follows:

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence - (1) No Court shall take cognizance -

(a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860) or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence.

On a bare reading of sub-section (1) of section 195 of the Code makes it very clear that when an offence is punishable under section 172 to 188 of the IPC is said to have been committed, then the Court can take cognizance of the offence only on the basis of a complaint in writing of the public servant concerned or some other public servant to whom he is administratively subordinate. Therefore, before a Court can take cognizance of these offence, the pre-condition is that there must be a complaint in writing of a public servant before the court. The offence in question is one under section 186 read with section 114 of IPC. Therefore, this offence stands squarely covered by section 195 (1)(a)(i) of the Code. In that view of the matter, it was necessary for the learned Magistrate to have a complaint in writing of a public servant for taking cognizance. The term 'complaint' has been defined in clause (d) of section 2 of the Code which reads as follows:

"(d) "complaint" means any allegation made orally or in writing to a Magistrate,

with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

This means that according to the definition of complaint in section 2 (d) of the Code, There must be some allegations made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Therefore, a police report filed under the provisions of section 173 of the Code is not a complaint within the meaning of section 2(d) of the Code. In the present case, it is found that the original informant and the Deputy Engineer of the Board had filed FIR before the police station and after investigation, the police investigating agency has submitted charge-sheet and the learned Magistrate has taken cognizance of these offences on the basis of charge-sheet submitted to him. This would clearly mean that the Magistrate has not taken cognizance of the offence punishable under section 186 read with section 114 of IPC on the basis of the complaint but the cognizance has been taken on the basis of the police report i.e. charge-sheet received by him under section 173 of the Code. Section 190 of the Code again makes it clear that cognizance can be taken in three ways as under:

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

10. In the present case, charge sheet has been submitted and cognizance has been taken on the strength of charge sheet submitted under section 173 of the Code. This would clearly mean that the cognizance has been taken by the learned Magistrate in accordance with the provisions made in section 190(b) of the Code and not in accordance with the provisions made in Section 190(a) of the Code.

11. Now, as said above, the provision made in section 195 of the Code is very clear and it clearly says that

the cognizance is required to be taken for an offence punishable under section 186 of IPC only on the basis of a complaint of a public servant. It is, therefore, clear that the learned Magistrate has taken cognizance of the offence on the basis of the charge sheet or police report under section 173 and not a complaint as described in section 2(d) of the Code. In that view of the matter, the learned Magistrate has committed serious illegality in taking cognizance of offence punishable under section 186 read with section 114 of IPC without having a complaint of a public servant. The learned Magistrate has again committed serious error in law in taking cognizance of the said offence on the strength of police report under section 173 of the Code. In other words, the learned Magistrate had no jurisdiction to take cognizance of an offence punishable under section 186 of IP Code on the strength of police report under section 173 of the Code. Therefore, the learned Magistrate has acted while prosecuting the present petitioners for offence under section 186 of the I P Code read with section 114 of IPC, without having jurisdiction to take cognizance the said offence against them. In other words, the entire proceedings conducted by the learned Magistrate for an offence punishable under section 186 read with section 114 of IPC is without jurisdiction i.e. the learned Magistrate has committed serious jurisdictional error in prosecuting the petitioners for the said offence. When the jurisdictional error is found to have been committed by the learned Magistrate, then even the order convicting the petitioners for the said offence has to be treated without jurisdiction and when there is jurisdictional error, it becomes the duty of the court to interfere with the said judgment and conviction order recorded by the learned Magistrate.

12. When the learned Magistrate had no jurisdiction to proceed against the petitioners for offence under section 186 of the Code read with section 114 of IPC without having a complaint before him as defined in section 2(d) of the Code, then the said jurisdictional error cannot be rectified by a subsequent judgment recorded by the learned Addl.Sessions Judge confirming the conviction recorded by the learned Magistrate. In the aforesaid view of the matter, I am of the clear decision that there is jurisdictional error committed by the learned Magistrate and, therefore, the judgment and order recorded by the learned Magistrate convicting the present petitioners for offence under section 186 of the Code read with section 114 of the IPC is illegal and without jurisdiction. When the judgment and conviction order recorded by the learned Magistrate are illegal and

without jurisdiction, then the judgment and order of the learned Sessions Judge in the aforesaid appeal confirming such order of conviction equally becomes illegal and consequently the petitioners could not have been convicted by the two courts below for the offence punishable under section 186 read with section 114 of IPC.

13. In above view of the matter, when the petitioners were convicted for the said offences under section 39 and 39A of the Act by the two courts below and when the said offences are not made out and there is no semblance of evidence and when the judgment and conviction orders recorded by the two courts below are against the weight of evidence, the findings of fact are illegal and perverse and, therefore, the petitioners are entitled to acquittal of the said orders offence. So far as the offence punishable under section 186 read with section 114 of IPC is concerned, again there is jurisdictional error committed by the learned Magistrate and, therefore, the petitioners are entitled to be acquitted on account of the jurisdictional error committed by the learned Magistrate. No other offence stands against the petitioners, since the petitioners have been acquitted for the offence under 39A of the said Act.

14. In above view of the matter, the judgments and conviction orders of the two courts below are on the face of them, illegal and perverse and, therefore, it is necessary for this court to interfere with them. In the result, this Revision Application is allowed. The judgments and orders recorded by the two courts below as aforesaid are set aside and petitioner no.1 is acquitted of the offence punishable under section 39 of the Indian Electricity Act as well as for the offence punishable under section 186 read with section 114 of IPC. Petitioner no.2 is ordered to be acquitted of offence punishable under section 186 read with section 114 of IPC. Fine if any, paid by these two petitioners shall be refunded to them. Bail bonds stand cancelled.

Rule is made absolute accordingly.

2.5.2001 [D P Buch, J.]
msp